ASAINAR SAINUDIN & ANOR

v.

MOHAMAD SALAM SIDIK

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NO: 12-42-1997]
12 SEPTEMBER 2001

DAMAGES: *Quantum - Multiplier - Sessions judge granted award based on 56 years' purchase - Whether appropriate multiplier - Whether resort should be had to multiplier of 16 years' purchase under s. 28A Civil Law Act 1956 - Whether also contingencies to provide for increases in future costs to be taken into account*

DAMAGES: *Quantum - Method of calculation - Annuity tables and direct multiplication - Which applicable - Multiplier of 16 years' purchase under s. 28A Civil Law Act 1956 - Contingencies for increases in future costs*

This was an appeal by the appellants against the award of the sessions judge made against the appellants. The award was calculated based on a 56 years' purchase as a direct multiplier for costs of nursing care, pampers and wheelchairs for the respondent who was 14 years at the time of the accident. The appellants submitted that the award should be calculated based on the annuity tables or alternatively if calculated based on the direct multiplier, a deduction of a third should be made to the 56 years' purchase.

Held:

[1] In *Tan Cheong Poh & Anor v. Teow Ah Keow* where the Court of Appeal held that the trial judge had properly used the annuity tables, the cause of action therein arose in 1982 when reliance upon the annuity tables was still the practice. The decision did not purport to be applicable to post 1 October 1984 when s. 28A of the Civil Law Act 1956 ('CLA') came into effect. Further, in *Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim*, the Supreme Court held that there was no need of any legislation to repeal what was a matter of practice. (pp 400 e-g & 402 f-g)

[2] The 16-year formula under s. 28A CLA assumes that the lump sum will be invested at 6.25% per annum and thus generating indefinitely the intended monthly payment. A contingency should be added to the present day costs to account for an increase in future costs in respect of nursing care, pampers and wheelchairs. (p 403 g)

[3] An assumption that the respondent could live up to 70 years was rather optimistic. An assumption that he could expect to live up to 60 years was neither optimistic nor pessimistic. That did not mean that the respondent would have no funds after the age of 60 years. That assumption was only for the purpose of estimating the contingency to be applied. A contingency of 100% to double the present day costs should be applied. Following the case of *Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim*, the application of s. 28A(2)(d) CLA to the costs of nursing care was also extended to the costs of pampers and wheelchairs. (pp 403 h-i & 404 a-d)

[4] The sums awarded were expected to be deposited or placed in safe investments. If placed in deposit accounts or investments with at least 6.25% return, the said sums would return excess amounts in the initial years which could be saved to cover the increases in costs in later years. (p 404 d-e)

Per curiam:

[1] Each of the methods of calculations has its strength and weaknesses. The straight line calculation over an expected lifetime, which herein was 56 years, results in overpayment as the lump sum deposited in a simple interest at 4% interest will yield well in excess of the intended sum required per month. It ignores the basic prudence that a lump sum would be placed in an interest bearing account. Its strength is that the interest derived could help to cover the costs of unpredictable inflation. Yet the calculations show that the interest earnings over the period to be very substantial. On the other hand, the annuity calculation is very precise, but by its precision, it fails to allow the possibility of inflation and even the possibility that the recipient can live longer than foreseen when the calculations are made. That means that if the recipient lives longer then expected, he may face the prospect of having nothing at all to rely on. Uncertainty or contingency occurs then in respect of (a) probable rising costs over and above the present costs (b) the interest rate obtainable for the deposit, and (c) the possibility the recipient may live longer than expected. (p 401 d-g)

[2] In view of the above, the limit of 16 years' purchase may appear harsh and uncaring, particularly in the present case where the respondent was 14 years old and could live for another 56 years. Such a conclusion arises from a misunderstanding of the very nature of lump sum payments, *ie*, that the lump sum payment is intended to be a capital sum which is invested to give the monthly sum due. The lump sum payment can provide a constant stream of income for nearly an indefinite period if the capital sum is prudently deposited. But it is undeniable that costs could increase in the future. In addition, the probability and increase of cost increases

with the length of the term. Thus, previous cases have held that the way to deal with future costs increases is to allow for contingencies and it is only fair that a contingency be added to the present day costs to account for future cost variations in any individual case. (pp 401 g-i & 402 a-b)

[Appeal against order of sessions judge that interest at rate of 8% from date of service of writ of summons to date of judgment for post-trial portions of costs allowed; appeal on quantum in respect of nursing care, pampers and wheelchair allowed; damages accordingly.]

Case(s) referred to:

Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174 ***(foll)***

Tan Cheong Poh & Anor v. Teow Ah Keow [1996] 3 CLJ 665 ***(not foll)***

Legislation referred to:

Civil Law Act 1956, s. 28A(2)(d)

For the appellants - S Suresh (Jude Raj); M/s Kanaga, Suresh & Co
For the respondent - L Parthiban (Zainal Kamis); M/s L Parthiban & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

The subject of the appeal by the defendants (the appellants) is the award made by the judge of the Sessions Court against the appellants, wherein the calculation was based on 56 years' purchase; and which was used as a direct multiplier for costs of nursing care, pampers and wheel-chair, for the plaintiff (the respondent) who was 14 years of age at the time of the accident.

For nursing care the learned judge awarded the sum of RM18,000 for the pretrial period of five years; and RM200 x 12 x 51 = RM122,400 for the balance 51 years. For the cost of pampers, the learned judge awarded RM129 for three packages per month. The learned judge awarded RM129 x 12 x 51 = RM78,948 for the post-trial 51 years, and overlooked RM43 x 3 x 12 x 5 = RM7,740 for the pre-trial period of five years. The respondent however did not appeal. In respect of the wheel chair, taking into account the plaintiff had used three wheelchairs in two years, and having paid RM450 for the first and RM500 for the second and third wheelchairs, the learned judge had awarded RM500 x 56 / 2 = RM14,000.

The appellants submit that the awards should be calculated on the basis of the annuity tables or alternatively, if calculated upon a straight multiplier, then a deduction of a third should be made to the 56 years' purchase.

The first question posed in this appeal is whether, under s. 28A of the Civil Law Act 1956 effective 1 October 1984, the award is to be calculated on a straight multiplier basis or based upon the annuity tables.

Section 28A provides as follows:

28A. Damages in respect of personal injury.

(1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account –

(a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;

(b) any pension or gratuity, which has been or will or may be paid as result of the personal injury; or

(c) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.

(2) In assessing damages under this section –

(a) no damage shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;

(b) if the plaintiff's expectation of life has been reduced by the injury, the Court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;

(c) in awarding damages for loss of future earnings the Court shall take into account –

(i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;

(ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;

(d) in assessing damages for loss of future earnings the Court shall take into account that –

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and

(ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

The limitations under s. 28A(2) apply in respect of loss of expectation of life caused by the injury, and assessment and award of damages for loss of future earnings. No mention was made of other heads of damages that cannot be categorised as loss of future earnings, such as cost of nursing care, pampers and wheelchairs. Thus it is clear that on the face of it, s. 28A(2) affects claims for loss of expectation of life and for loss of future earnings only, and does not purport to affect other heads of claims.

Counsel for the appellants relied upon *Tan Cheong Poh & Anor v. Teow Ah Keow* [1996] 3 CLJ 665; where the Court of Appeal held that the trial judge had properly used the annuity tables and on the correct basis that Teoh Ah Keow who was 23 years old, could be expected to live up to 60 years. The cause of action in *Tan Cheong Poh & Anor v. Teow Ah Keow* however, arose in 1982 when reliance upon the annuity tables was still the practice. The decision did not purport to be applicable to post 1/10/1984 when s. 28A came into effect. Indeed the judge was held to have erred in relying on s. 28A in relation to loss of future earnings. The case cannot therefore be read as having established any principle that the annuity tables continue to be used for heads of claims other than loss of expectation of life and loss of future earnings under s. 28A(2).

The debate between whether to use the annuity tables or a direct multiplication is not one concerning what is the cost of the damage on a monthly or other basis over a period of time, but about how that lump sum is to be arrived at or calculated for a lump sum award. For example, an award of RM200 per month for 56 years, on a straight multiplication of RM200 x 12 x 56, would give a sum of RM134,400. But this sum of RM134,400 if deposited in a simple interest bearing account at 4% interest would yield RM448 per month, well in excess of the intended RM200 per month.

Furthermore, if payment is awarded and paid as a lump sum at the beginning, the last RM200 for the end of the 56th year is received at the beginning, ie 56 years too early. If deposited and earning 4% compounded, the RM200 plus accumulated interest would rise to about RM1,798 by the end of the 56th year. Indeed the sum total of all individual monthly RM200 payments deposited separately on similar basis for the periods until they are due, would result in a total of nearly half a million ringgit. If then only RM200 were actually used every month for 56 years, the recipient of RM134,400 at the beginning would have profited by about RM365,000.

On the other hand, a modest sum of RM60,000 deposited at the beginning in an interest bearing account, even if earning a modest 4% simple interest, would earn RM2,400 per annum, thus easily giving RM200 per month, for an indefinite period, and at all times maintaining intact the capital sum of RM60,000. The annuity tables would refine the formula further such that the capital sum would also reduce to zero over the given period, which in case of the above example, is 56 years.

Each of these methods of calculations has its strengths and weaknesses. The straight calculation over an expected lifetime, which in this case is 56 years purchase, results, as illustrated above, in overpayment. It ignores the basic prudence that a lump sum would be placed in an interest bearing account. Its strength is that the interest derived could help to cover the costs of unpredictable inflation. Yet the calculations show that the interest earnings over the period to be very substantial. On the other hand, the annuity calculation is very precise, but by its precision, it fails to allow for the probability of inflation, and even the possibility that the recipient could live longer than foreseen when the calculations were made. This could mean that if the recipient actually lives longer than expected, he may face the prospect of having nothing at all left to rely on. Uncertainty or contingency occurs then in respect of a) the probable rising costs over and above the present costs, b) the interest rate obtainable for the deposit, and c) the possibility that the recipient may live longer than expected.

In this light the limit of a maximum of 16 years' purchase in s. 28A may appear to be harsh and uncaring, particularly as in this case where the respondent is 14 years old and could live for another 56 years. In my view such a conclusion arises from misunderstanding of the very nature of lump sum payments. Firstly, the lump sum payment is intended to be a capital sum, which is invested to give the monthly sum due. The lump sum is calculated from the monthly sum due, which as a present monthly cost can easily be determined. But it is undeniable costs could increase in the future. In addition, the probability and increase of cost increases with the length of the term. In

practice nobody can predict with any accuracy what will be the case in five years' or 16 years' time, let alone 56 years. Thus previous cases have held that the way to deal with future cost increases is to allow for contingencies. The age of the injured party, the nature of injuries as well as nature of remedy for which cost is incurred affect the contingency. Thus though an injury might well shorten the life of a person the fact that he is younger than another justifies a contingency he would live longer than one older than he; and the longer the period the more likely there will be an increase in cost.

In *Marappan Nallan Koundar & Anor. v. Siti Rahmah Ibrahim* [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174 the Supreme Court had rejected the submission by counsel in relation to s. 28A of the Civil Law Act that the use of annuity tables had not been repealed and should therefore continue to be used after 1 October 1984:

> In the fourth and fifth grounds of appeal the appellants stated that the learned Judge had misdirected himself that the usage of the annuity tables in this country was more a matter of practice than of law. It was submitted by Counsel that the learned Judge ought to have applied the annuity tables in calculating the award of damages in accordance with the trend of previous awards and had misdirected himself in holding that the direct multiplier should apply to the case of the plaintiff "as contingencies and the lump sum payment had been taken care of by the amendment as to the set multiplier". In the event the learned Judge had awarded RM350 x 12 x 16 amounting to RM67,200 for the cost of future care and RM345 x 12 x 16 totalling RM66,240 for future loss of earnings. Counsel's contention was that s. 28A of the Civil Law Act 1956, relating to damages in respect of personal injury has not referred to the annuity tables which have been used in this country as a matter of practice for a long time. *He submitted that the annuity tables have not been "repealed" and should therefore still be used calculating the award of damages in accordance with the trend of previous awards. We rejected that submission of Counsel, because there is no need of any legislation to repeal what was a matter of practice,* and considered that the learned Judge had not misdirected himself in applying the direct multiplier rather than using the annuity tables in calculating the award of damages for the cost of future care and loss of future earnings in this case. (emphasis added)

In *Marappan Nallan Koundar & Anor. v. Siti Rahmah Ibrahim* the accident occurred on 12 October 1986. Section 28A was applied. The respondent Siti Rahmah Ibrahim was 23 years old at the time of accident. The award for cost of future care, at $350 per month, calculated on the maximum 16 years purchase: $350 x 12 x 16 = $67,200, was sustained by the Supreme Court. It is clear that the Supreme Court extended the principle of s. 28A(2)(d), of straight-line calculation to a maximum of 16 years to heads of damages other than loss of future earnings.

There is much to be said in favour of applying a single consistent principle throughout. I have said earlier above that the limitation to 16 years purchase may appear to be harsh and uncaring. The key factor to understanding the limitation of 16 years is understanding that the period of 16 years was arrived at upon the assumption that the lump sum awarded is invested and obtains a return of 6.25%. In the example above, a sum of RM200 x 12 x 16 = RM38,400 would still yield RM200 per month indefinitely if it were earning interest of not less than 6.25% per annum without diminution of the capital sum. Thus even though there seems to be an artificial limitation of 16 years purchase, the lump sum could provide for a constant income stream for a nearly indefinite period if the capital sum is prudently deposited. The key factor is obtaining a rate of return of at least 6.25%.

In this case, the monthly sums as well as the cost of wheelchair, as summarised in para. 2 above, were determined upon a straight calculation of 56 years. Without allowing for contingencies of future cost increases the calculation based upon *Marappan Nallan Koundar & Anor. v. Siti Rahmah Ibrahim,* and, would be as follows:

i) Nursing care: RM200 x 12 x 16 = RM38,400

ii) Pampers: RM129 x 12 x 16 = RM24,768

iii) Wheelchair RM500 x 16 / 2 = RM4,000

But cannot be overlooked that these costs of nursing care, pampers and wheelchairs can only be expected to rise in the future. It cannot be denied that the longer the future period, the more will be the increase. It is only fair that a contingency be added to the present day costs to account for future cost variations in any individual case. For the estimation of contingency I take the following into consideration.

The 16-year formula under s. 28A of the Civil Law Act assumes that the lump sum will be invested at 6.25% per annum, and thus generating indefinitely the intended monthly payment. In seeking to estimate a contingency to account for future cost increases of nursing care, pampers and wheelchairs, an assumption of cost increases of up to that magnitude is not unreasonable. Although in percentage terms the figure appear small, the accumulated effect of such small increases over time can be considerable.

It is fair to assume that a normal healthy person could live up to 70 years old. But we are concerned with making a fair estimate of the needs of the respondent for nursing care, pampers and wheelchairs, and not a normal healthy person. An assumption that the respondent could live to 70 years is rather optimistic. In my judgment, an assumption that he could expect to live to 60

years of age is neither too optimistic nor too pessimistic. I would add that this does not mean the respondent will have no funds after the age of 60 years, but this estimate is only for the purpose of estimating the contingency to be applied.

Considering that the respondent may be expected to live for another 46 years, a contingency of 100%, ie, to double the present day costs. The awards should be:

i)	Nursing care: RM200 x 2 x 12 x 16	=	RM 76,800
ii)	Pampers: RM129 x 2 x 12 x 16	=	RM 49,536
iii)	Wheelchair RM500 x 2 x 16 / 2	=	RM 8,000
	TOTAL		RM134,336

To summarise, these sums have been arrived at by applying *Marappan Nallan Koundar & Anor. v. Siti Rahmah Ibrahim* wherein the Supreme Court accepted as correct the application of the s. 28A(2)(d) to nursing care, and by extension to pampers and wheelchair costs. Although these sums appear modest compared to a straight line multiplication, these sums are expected to be deposited or placed in safe investments. If placed in deposit accounts or investments with at least 6.25% return, these sums would return excess amounts in the initial years which could be saved to cover cost increases in later years.

A further ground of appeal is that the learned judge had erred in ordering interest at the rate of 8% from the date of service of the writ of summons to the date of judgment for post-trial portions of the above costs. Counsel for the respondent properly conceded. This ground of appeal is therefore allowed.

The appeal on quantum in respect of nursing care, pampers and wheelchair is allowed, and the damages allowed are as set out above.